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Communication No. 2121/2011

Decision concerning communication No. 2121/2011 adopted by the Committee under the Optional Protocol*, **

Communication submitted by:	F.A.H. and others (represented by counsel, Alberto León Gómez Zuluaga)
Alleged victims:	The authors
State party:	Colombia
Date of communication:	22 June 2010 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 19 December 2011 (not issued in document form)
Date of adoption of Views:	28 March 2017
Subject matter:	Arbitrary dismissal
Procedural issues:	Other procedures of international investigation or settlement; abuse of the right of submission of communications; non-exhaustion of domestic remedies; insufficient substantiation of allegations
Substantive issues:	Due process; freedom of association; equality before the law
Articles of the Covenant:	Articles 2 (2) and (3), 14 (1), 22 and 26
Articles of the Optional Protocol:	Articles 2, 3 and 5 (2) (a) and (b)

1. The authors of the communication are F.A.H., R.D.C., G.V.B., J.J.R.R. and J.M.P., all of whom are Colombian nationals of full age. They assert that the State party violated

* Adopted by the Committee at its 119th session (6-29 March 2017).

** The following members of the Committee participated in the examination of the present communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany and Margo Waterval.

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their rights under article 14 (1), read separately and in conjunction with articles 2 (2) and (3), 22 (1) and 26 of the Covenant. The authors are represented by counsel.[1]

The facts as submitted by the authors

2.1 F.A.H., R.D.C., G.V.B., J.J.R.R. and J.M.P. started working for the National Federation of Coffee Growers of Colombia ("the Federation") under fixed-term contracts on 2 May 2005, 15 December 2003, 1 February 2006 and 1 September 2004, respectively.[2] Federation employees could join the National Union of Workers of the National Federation of Coffee Growers of Colombia (SINTRAFEC) and/or the National Union of Coffee-Industry Workers (SINTRAINDUSCAFÉ).

2.2 On 8 April 2007, G.V.B. joined SINTRAINDUSCAFÉ. On 24 April 2007, F.A.H., R.D.C., J.J.R.R. and J.M.P joined SINTRAFEC and SINTRAINDUSCAFÉ. In 2007, the authors were elected to the governing body of SINTRAINDUSCAFÉ. Their election was registered with the Ministry of Social Protection and notification was provided to the Federation.

2.3 The authors claim that the collective labour agreements between the Federation and SINTRAFEC, in particular the ones concluded in 1974 and 1976, provide that when an employee has worked under fixed-term contracts for a continuous period of more than one year, the contract must be converted to a permanent contract. Since 1982, the collective agreements between SINTRAFEC, the Federation and Almacenes Generales de Depósito de Café S.A. (Almacafé) have stipulated that their provisions apply to all workers. As the authors had worked for the Federation under successive fixed-term contracts for a total continuous period of more than one year, their contracts had, de jure, become permanent contracts. In addition, by law, as members of the governing body of a trade union, they enjoyed trade union privileges and thus could not be dismissed, demoted or transferred without prior judicial authorization.

2.4 Through letters sent to the authors at least one month in advance, the Federation terminated the employment contracts of F.A.H., R.D.C., G.V.B., J.J.R.R. and J.M.P. as of 31 October, 30 June, 22 December and 31 August 2007, respectively,[3] without prior judicial authorization or removal of trade union privileges.

2.5 F.A.H., R.D.C., G.V.B., J.J.R.R. and J.M.P. took action against the Federation by submitting a special application for reinstatement on the grounds of trade union privileges to the Fifth Labour Court, the Seventh Labour Court, the First Labour Court, the Fifteenth Labour Court and the Fourth Labour Court, respectively, all of which belong to the Bogotá Circuit. The authors claimed that, in accordance with article 40.1 of the 1974 agreement,[4] reaffirmed by article 8.1 of the 1976 agreement,[5] their fixed-term contracts should be deemed to have been converted to permanent contracts and that their dismissal was a

[1] The Covenant and the Optional Protocol entered into force for the State party on 23 March 1976.

[2] J.J.R.R. and J.M.P started working for the Federation on the same day.

[3] The Federation terminated the contracts of J.J.R.R. and J.M.P on the same date.

[4] 1974 agreement, article 40, Job security and employment contracts: In the event that the employer unilaterally terminates an employment contract without just cause, it shall compensate the employee as follows, in accordance with the length of service:

[...]

Paragraph 1. Any fixed-term employee who completes or has completed one year of continuous service to the employer shall be employed on a permanent basis under an open-ended contract.

Paragraph 2. All matters relating to compensation for dismissal without just cause shall be governed by this article, and the provisions contained in previous agreements or arbitral awards are hereby revoked.

[5] 1976 agreement, clause 8, Job security and employment contracts: In the event that the employer unilaterally terminates an employment contract without just cause, it shall compensate the employee as follows, in accordance with the length of service:

...

Paragraph. Any fixed-term employee who completes or has completed one year of continuous service to the companies shall be employed on a permanent basis under an open-ended contract.

violation of their trade union privileges. On that basis, they sought reinstatement in their jobs and payment of back wages.

J.M.P.

2.6 On 25 January 2008, the Fourth Court upheld the claim of J.M.P., finding that he had been entitled to trade union privileges at the time that the Federation had terminated his employment and that, pursuant to article 40.1 of the 1974 agreement between SINTRAFEC, Almacafé and the Federation, the author was employed on a permanent basis under an open-ended contract. The Court noted that the article in question had not been tacitly or expressly revoked by other legal provisions or by subsequent collective agreements. The Court ordered that the author should be reinstated in his former job with the Federation and that he should receive his back wages.

2.7 The Federation appealed against the ruling before the High Court of Justice of Bogotá. On 13 June 2008, the High Court overturned the lower court's decision and dismissed the author's claim. The High Court pointed out that the provision contained in article 40.1 of the 1974 agreement had been neither in force nor binding when the Federation had terminated its employment relationship with the author, since it had not been included in the collective agreements signed after 1978. That being the case, the termination of the employment relationship should be considered to have resulted from the expiry of the fixed-term contract of the author, who had been duly notified within the time frame stipulated in the Substantive Labour Code.

2.8 J.M.P. later filed a special petition for *amparo*, which was rejected by the Supreme Court and was not taken up by the Selection Chamber of the Constitutional Court for review.

R.D.C.

2.9 On 3 March 2008, the Seventh Court found that R.D.C. had been entitled to trade union privileges at the time of his dismissal and that he had been dismissed without just cause, since the Federation had not sought judicial authorization for that action. The Court pointed out that, in accordance with the case law of the Supreme Court, a provision of an agreement remains in force unless it is revoked; the provision contained in article 40.1 of the 1974 agreement, reaffirmed in article 8.1 of the 1976 agreement, therefore remained in force, since it had not been revoked or amended by article 3 of the 1978 agreement. As a result, at the time when the employment relationship was terminated, the author had a permanent contract. The Court ordered the reinstatement of R.D.C. in the job he had held with the Federation as at 30 June 2007 and the payment of his back wages.

2.10 The Federation appealed against the ruling before the High Court of Justice of Bogotá. On 24 October 2008, the High Court overturned the lower court's ruling and dismissed the author's claim. The High Court ruled that the contract between the Federation and the author had been a fixed-term contract and that the termination of the employment relationship had resulted from the expiry of that contract and that the author had been duly notified within the time frame stipulated in the Substantive Labour Code. The High Court referred to its ruling of 28 October 2008 on the claim filed by G.O.C., in which it had found that article 8 of the 1976 agreement remained in force, but only for workers who had been in the company's service at the time the agreement was signed.

G.V.B.

2.11 On 18 April 2008, the First Court found that G.V.B. had been entitled to trade union privileges at the time of his dismissal and that he had been dismissed without just cause, since the Federation had not sought judicial authorization for that action. The Court ordered his reinstatement in his former job with the Federation and the payment of his back wages.

2.12 The Federation appealed against the ruling before the High Court of Justice of Bogotá. On 29 August 2008, the High Court overturned the lower court's ruling and dismissed the author's claim, finding that the Federation had terminated the contract upon expiry of the term stipulated therein, a decision for which no judicial authorization was

required.[6] Regarding the issue of trade union privileges, the High Court referred to the collective agreements of 1972-1974 and 1976-1978 and found that:

> Therefore, considering that the paragraph of article 40 of the collective labour agreement of 1972-1974, like the paragraph of clause 8 of the collective agreement of 1976-1978, was not amended or revoked by subsequent collective agreements, it remains in force; the parties do not appear to have revoked it, as, since it was an expression of the parties' will and the outcome of a collective bargaining process, it could only be revoked by the same means and in the same way. Moreover, in subsequent agreements, it was reaffirmed inasmuch as the parties expressly agreed that provisions that had not been revoked or amended were deemed to remain in force.

2.13 G.V.B. later filed a special petition for *amparo* which was rejected by the Supreme Court and was not taken up by the Selection Chamber of the Constitutional Court for review.

J.J.R.R.

2.14 On 9 May 2008, the Fifteenth Court rejected the claim of J.J.R.R. on the ground that the contractual relationship had ended not because the author had been dismissed, but because his fixed-term contract had expired and the Federation had decided not to renew it.

2.15 J.J.R.R. appealed against this ruling before the High Court of Justice of Bogotá. On 31 July 2008, the High Court dismissed the appeal and upheld the lower court's ruling. The High Court determined that the author, as a member of the governing body of the Chinchiná-Caldas branch of SINTRAINDUSCAFÉ, had been entitled to trade union privileges pursuant to article 406 of the Substantive Labour Code. However, the author and the Federation had signed a fixed-term employment contract for a period first of six months and then of one year, which had been extended successively until 1 September 2007, whereupon the contract had expired following notification by the Federation as required by law. The High Court added that the provision contained in article 40.1 of the 1974 collective labour agreement and subsequently included in article 8 of the 1976 agreement, which stipulated that a fixed-term contract should be converted to a permanent contract, had not been in force during or after 2004 because it had not been included in the collective agreements signed after 1978.

2.16 J.J.R.R. later filed a special petition for *amparo* which was rejected by the Supreme Court and was not taken up by the Selection Chamber of the Constitutional Court for review.

F.A.H.

2.17 On 8 July 2008, the Fifth Court rejected the claim of F.A.H. The Court found that the author had been entitled to trade union privileges since 24 April 2007; that the fixed-term employment contract signed on 2 May 2005 had been extended on the same terms without interruption until 31 October 2007; that termination of the contract, without prior evaluation by a judge, upon expiry of the agreed term was permissible under article 411 of the Substantive Labour Code, subject to notification of the employee at least 30 days before the expiry of the contract; and that this procedure applied to all employees working under that type of contract, whether or not they enjoyed trade union privileges, and thus did not require prior judicial authorization.

[6] In this regard, the ruling states that the fixed-term employment contract began on 1 February 2006 and ended on 22 December 2006; it was extended on 23 December 2006 for another fixed term. The Court held that "it is clear that, at the time of the extension, the worker had not yet completed one year of service. It therefore cannot automatically be assumed that as from 23 December 2006 he was working under a permanent contract of the kind referred to in the labour agreement ... the job security clause reads 'shall be employed on a permanent basis under an open-ended contract', but does not state that a contract is considered open-ended after one year of service. It is at the time of employment or, more specifically, extension that the requirement of open-endedness comes into play."

2.18 F.A.H. appealed against this ruling before the High Court of Justice of Bogotá. On 28 November 2008, the High Court dismissed the appeal and upheld the lower court's ruling. The High Court noted that article 40.1, "Job security and employment contracts", of the 1974 agreement, which provided for the conversion of fixed-term contracts to permanent contracts, had been amended by the subsequent agreements of 1978 and 1980, of which article 3, "Job security", governed only compensation for the unilateral termination of an employment contract without just cause and made no reference to the conversion of fixed-term contracts to permanent ones. Therefore, the provision contained in article 40.1 had been neither in force nor binding when the Federation had terminated its employment relationship with the author. That being the case, since it had been established that the author had been employed under successive fixed-term contracts, the termination of the employment relationship should be considered to have resulted from the expiry of the fixed-term contract of the author, who had been duly notified within the time frame stipulated in the Substantive Labour Code.

2.19 F.A.H. later filed a special petition for *amparo* with the Supreme Court, which rejected the petition on 2 March 2009. In August 2009, the Selection Chamber of the Constitutional Court decided not to take up this case for review.

2.20 The authors claim that, with the rulings of the High Court of Justice of Bogotá, they have exhausted all effective domestic remedies. Some of them also filed petitions for *amparo*, a constitutional remedy for the protection of fundamental rights, without success. In the State party, however, a petition for *amparo* is a special remedy.[7]

The complaint

3.1 The authors assert that the State party violated their rights under article 14 (1), read separately and in conjunction with articles 2 (2) and (3), 22 (1) and 26 of the Covenant. The authors also request the Committee to find such other violations of rights under the Covenant as may be indicated by the facts set forth in the communication.

3.2 The authors claim that the High Court of Justice of Bogotá recognized that they were entitled to trade union privileges, owing to the positions they held in SINTRAINDUSCAFÉ, and therefore could not be dismissed without prior judicial authorization. In practice, however, through its arbitrary interpretation and application of the legal provisions relevant to their cases, including the collective labour agreements between the trade unions and the Federation, the High Court found that the Federation had not dismissed them. As a result, the authors did not have access to effective legal protection, and the court decisions constituted a denial of justice and a violation of their right to due process, especially to equality before the courts and to an independent and impartial tribunal, in breach of article 14 (1), read separately and in conjunction with article 2 (2) and (3), of the Covenant.

3.3 The right to freedom of association, enshrined in article 22 (1) of the Covenant, guarantees the right of individuals to form trade unions and to join a trade union of their choice. The State party violated this right by allowing the Federation to dismiss the authors without enforcing the trade union privileges to which they were entitled under article 405 of the Substantive Labour Code. They add that the law extends trade union privileges to all workers who serve as trade union representatives, without distinction as to the nature of their contracts, and that the High Court's decisions disregarded the legislation in force and the case law of the Constitutional Court.[8]

3.4 The High Court's rulings constitute a violation of the authors' right to equality before the law under article 26 of the Covenant. A single court must not adopt different decisions on cases that are identical in terms of facts, legal issues and evidence. On 31 July 2008, however, the High Court's Labour Division issued a ruling on an identical case

[7] With regard to the authors' claims relating to the requirement of the exhaustion of domestic remedies, see also paragraph 5.5.

[8] The authors refer, inter alia, to Constitutional Court Judgment No. T-683 of 2006.

brought by J.A.H.P.,[9] in which it found that the applicant enjoyed trade union privileges and that the Federation should reinstate him in his former job and pay him back wages and benefits. In this regard, the High Court held that:

> The provision under consideration [article 8 of the 1976 agreement] remains in force, inasmuch as it was never expressly revoked by the provisions of subsequent agreements.
>
> ...
>
> In the case of collective agreements and, more specifically, provisions that recognize rights or establish guarantees for workers, the opposite rule applies, whereby the provisions remain in force so long as they are not expressly revoked, amended or renegotiated.
>
> ...
>
> The Supreme Court has also stated that when the parties to an agreement maintain a specific provision without amendment, they should be presumed to have decided to preserve that right over time, irrespective of changes in legislation on the same subject, for example.
>
> ...
>
> It must be concluded ... that the employment contract signed by the parties was of a permanent nature pursuant to an express provision of an agreement in force and, as such, could not have been ended by the expiration of the agreed term. That being the case, the defendant's unilateral decision to terminate the employment relationship while the applicant was protected by trade union privileges constitutes dismissal without just cause of a worker who enjoyed such privileges. It follows that the application for reinstatement must be granted.

3.5 The authors request the Committee to support their claim for full reparation, including guarantees of non-repetition, from the State party.

State party's observations on admissibility

4.1 In a note verbale dated 22 February 2012, the State party set forth its observations on the admissibility of the communication and requested the Committee to declare it inadmissible.

4.2 The State party maintains that the Federation did not dismiss the authors or terminate their employment contracts early. The authors had fixed-term contracts, which expired at the end of the agreed term. Moreover, during the same period, a large number of employment contracts expired owing to the nature of the coffee trade; the authors were not targeted on the basis of their trade union involvement.

4.3 The State party contends that the authors are seeking to have the Committee act as an appeals court for cases that have already been duly settled by national courts because they disagree with judicial decisions that go against their interests. The authors had the opportunity to lodge appeals with the national courts, which issued duly reasoned decisions in accordance with the laws in force. In the legal proceedings, due process was observed and the courts' actions were not arbitrary. The communication should therefore be declared inadmissible under article 2 of the Optional Protocol.

4.4 The communication constitutes an abuse of the right of submission and is therefore inadmissible under rule 96 of the Committee's rules of procedure. The State party maintains that the communication contains false, distorted, incomplete and unclear

[9] The case file contains a copy of the decision in question. In this decision, the High Court states that J.A.H.P. started working for the Federation on 2 February 2004 under a 320-day fixed-term contract, which was then renewed successively, and that on 8 April 2007 he joined SINTRAFEC and SINTRAINDUSCAFÉ. On 19 August 2007, he was elected as an alternate member of the national governing body of SINTRAINDUSCAFÉ, and on 13 November 2007, the Federation terminated his employment contract as of 17 December 2007, without prior judicial authorization.

information. The communication fails to mention that the 1976 agreement introduced a substantive amendment in the section on job security in the collective labour agreement of 1962 that abolished the mechanism for the automatic conversion of fixed-term contracts to permanent contracts. This omission helps to explain the courts' actions and decisions in the case. Moreover, the authors present their interpretation of the link between trade union privileges and type of employment contract as if it were International Labour Organization (ILO) doctrine. Yet no such doctrine exists, which is why they do not cite any ILO provisions to support their claims. Lastly, the authors are abusing the right of submission because there was a delay of approximately two years between the date of the last decision by the national courts and the date on which the communication was submitted to the Committee.

4.5 The State party adds that article 8 of the 1976 agreement, on job security and employment contracts, contained the following paragraph: "Any fixed-term employee who completes or has completed one year of continuous service to the companies shall be employed on a permanent basis under an open-ended contract." Subsequently, article 3 of the 1978 agreement, on job security, did not include the paragraph in question. More recent collective agreements have, in general, established that rights and benefits would remain in effect. Thus, no change was made to the 1978 provisions on job security, and the aforementioned paragraph remained absent when the events described in the communication took place. In the 1978 agreement, the trade union decided to leave out the paragraph in question in exchange for better pay and other employment benefits. The authors are misrepresenting the content of articles 27 and 11 of the 1982 and 1998 agreements. These agreements certainly stipulate that they apply to all workers. However, they cannot be interpreted in such a way as to justify the application of fixed-term employment rules that were revoked as from the 1978 agreement.

4.6 The authors' claim that they were unilaterally and unfairly dismissed is not true (see para. 4.2). Consequently, since they were not dismissed, their right to trade union privileges and their rights under article 22 of the Covenant were not violated.

4.7 The communication does not meet the requirement laid down in article 5 (2) (b) of the Optional Protocol because the issue could have been addressed through collective bargaining. Trade unions have the right, by law, to file petitions for that purpose, which place an immediate obligation on the employer to negotiate. Yet neither the authors nor the unions to which they belonged made use of this procedure.

4.8 The communication is inadmissible because the alleged violations of the Covenant are not sufficiently substantiated. The authors base their arguments on a paragraph that has been omitted since the 1978 agreement. Furthermore, their allegations relating to article 22 of the Covenant are of a general nature and are not supported by international treaties or by the positions and recommendations of the ILO Committee on Freedom of Association and Committee of Experts on the Application of Conventions and Recommendations. The State party underlines that, in the case of four of the authors, the labour courts ruled in accordance with established case law, which holds that trade union privileges do not alter the nature of an employment contract. The only case in which the court ruled differently was that of G.V.B., but this ruling, in itself, cannot be regarded as the prevailing case law at the time of the events. Likewise, the constitutional judges considering the petitions for *amparo* ruled in accordance with established case law.

Authors' comments on the State party's observations on admissibility

5.1 On 19 April 2012, the authors submitted their comments on the State party's observations, repeated the claims set forth in their communication and maintained that those claims were sufficiently substantiated for the purposes of admissibility.

5.2 The authors point out that the State party does not question the existence of the ruling of the High Court of Justice of Bogotá in the case of J.A.H.P.

5.3 The authors are not asking the Committee to act as a court of fourth instance or to review the evidence, but rather to assess the compatibility of the High Court's judicial decisions with the right of association enshrined in the Covenant and the rights established

in articles 2 (2) and (3) (a), 14 and 26. The High Court rulings are arbitrary and constitute a denial of justice.

5.4 With respect to the State party's observations on abuse of the right of submission, the authors maintain that their communication takes into account previous interpretations by national courts of the rights recognized in the collective agreements. In this regard, the 1978 agreement provided for the preservation of rights that had not been altered by the agreement; thus, article 3 of that agreement did not affect the regulations contained in previous agreements on the conversion of fixed-term contracts.[10] Under the Constitution, the protection of trade union representatives is not contingent on the existence of a permanent contract. Article 12 of Act No. 584 of 2000, which amends the definition of workers protected by trade union privileges given in article 406 of the Substantive Labour Code, does not exclude workers with fixed-term contracts. Furthermore, their communication was not submitted late but rather approximately two years after the most recent decisions of the domestic courts.

5.5 The authors claim that they have exhausted all available domestic remedies and that collective bargaining is not one of the domestic remedies covered by article 5 (2) (b) of the Optional Protocol. Proceedings may be brought before the ordinary courts for violations of trade union rights. Appeals against rulings handed down at first instance may be filed, after which the special remedy of cassation is not available. It is also possible to file a petition for *amparo*. However, in the State party, this is a residual or subsidiary remedy that can be used only when there is no other judicial remedy available to protect constitutional rights. In principle, petitions for *amparo* cannot be filed against judicial rulings, except when the ruling constitutes blatantly unlawful conduct. Court decisions on petitions for *amparo* are submitted to the Constitutional Court, which can select decisions for review in order to standardize constitutional case law. The authors filed petitions for *amparo* with the Supreme Court, even though this procedure is an optional special remedy, but the petitions were rejected by the Court in accordance with its case law, which establishes that petitions for *amparo* against court rulings are inadmissible. The Constitutional Court did not select the cases for review.

5.6 Regarding the principle of job security established in article 53 of the Constitution, the Constitutional Court has stated that, in certain circumstances, "the mere expiry of the term initially set by mutual agreement is not sufficient to justify the employer's decision not to renew the contract".[11] Meanwhile, with respect to the trade union privileges provided for in article 405 of the Substantive Labour Code, the Constitutional Court has stated that, in general: "the employer must demonstrate that there is just cause for dismissal and submit an explanation of this cause to the labour court judge for prior authorization. If this requirement is not met, employees and workers entitled to trade union privileges may request reinstatement and may also demand the back pay owed since the time of their dismissal."[12]

State party's observations on the merits

6.1 On 2 May 2014, the State party submitted its observations on the merits of the communication. The State party repeats that the communication is inadmissible.

6.2 The authors had effective access to the courts through applications filed for reinstatement by the Federation on the basis of trade union privileges, which were examined by two courts in accordance with due process. However, access to justice does not mean that a judge's decision must satisfy a particular party. In the authors' case, the courts ruled that they had had fixed-term contracts which had expired at the end of the agreed term; that, as the Federation had shown during the judicial proceedings, they had not

[10] The authors refer to the Supreme Court ruling of 17 September 2007, case No. 31556, *Ernesto René Sarmiento Gamboa v. Federación Nacional de Cafeteros de Colombia*. They add that the Supreme Court issued similar decisions in *Liliana Miguel Zapata v. Federación Nacional de Cafeteros de Colombia*, case No. 24107, ruling of 12 May 2005, and *Arturo Obando Gonzáles v. Federación Nacional de Cafeteros de Colombia*, case No. 27459, ruling of 2 November 2007.

[11] The authors are referring to Judgment No. C-016 of 1998.

[12] The authors are referring to Judgment No. T-029 of 2004.

been dismissed; and that the authors' entitlement to trade union privileges therefore did not alter the situation.

6.3 The courts did not violate the authors' right to equality before the law and the courts, given that it is not possible to draw comparisons with legislation and case law relating to cases in which workers with trade union privileges were actually dismissed by an employer, since the fact alleged by the authors, that is, their dismissal, did not occur.

6.4 In connection with article 22 of the Covenant, the State party maintains that the courts recognized the authors' right to join trade unions and, in particular, their right to trade union privileges. However, the courts found that the authors' right to such privileges did not change or affect the fact that the Federation was legally entitled to terminate the employment relationship by reason of the expiry of the fixed term agreed upon in their contracts.

6.5 The State party maintains that the communication is also inadmissible because the case is already being examined under another procedure of international investigation, having been submitted to the Special Committee for the Handling of Conflicts referred to the ILO (CETCOIT).[13] On 13 August, 1 September and 22 September 2011, SINTRAFEC submitted communications to ILO claiming that certain policies of the Federation constituted violations of the right of association and alleging that 26 workers with trade union privileges, including the authors, had been dismissed.[14] On 25 January 2012, ILO informed the State party of the communications. Between February and November 2012, CETCOIT took cognizance of the communications. In this context, on 28 June 2012, SINTRAFEC, ALMACAFÉ and the Federation agreed to begin negotiations. On 26 November 2012, SINTRAFEC informed CETCOIT that it no longer wished to pursue the matters that it had raised. On 26 December 2012, the Federation took note of the position of SINTRAFEC and informed CETCOIT that it was waiting for the latter to intervene with a view to resuming the dialogue with SINTRAFEC. The State party affirms that, to date, no statement accepting the withdrawal of the communications has been made by any ILO body or by CETCOIT, and the communications should therefore be considered to still be before ILO.

Authors' comments on the State party's observations

7.1 On 12 July 2014, the authors submitted their comments on the State party's observations on the merits of the communication.

7.2 The authors reiterate that as a result of the decisions of the High Court of Justice of Bogotá, which rejected their applications for reinstatement, the State party violated their rights to freedom of association and due process under articles 22 and 14 of the Covenant. The courts ruled in a contradictory manner, recognizing the authors' right to trade union privileges but failing to express a view on the consequences of the dismissal or termination of the contracts. The State party's actions therefore amount to a violation of due process, a denial of justice and a violation of the right of association of the individuals concerned.

[13] According to information on the ILO website, CETCOIT is a tripartite body established by agreement between the Government, employers and workers' representatives in Colombia, with the support and backing of ILO. In its proceedings, CETCOIT seeks to settle disputes relating to freedom of association by achieving a consensus between the parties, with the participation of CETCOIT representatives; such proceedings are chaired by a facilitator or mediator. Its role is to seek ways in which agreements and compromises might be reached between representatives of the three parties, on the basis of mutual understanding. See http://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/publication/wcms_462800.pdf.

[14] As can be seen from the documents attached by the State party, SINTRAFEC sent a letter to the President of the Republic of the State party on 13 August 2011, which was copied to ILO on 1 September 2011; it also sent letters to the General Manager and Administrative Manager of the Federation on 10 September 2011, which were copied to ILO on 22 and 23 September 2011, respectively. SINTRAFEC and SINTRAINDUSCAFÉ sent another letter to the General Manager of the Federation on 10 September 2011, which was copied to ILO on 22 September 2011. On 25 January 2012, ILO forwarded this correspondence to the Ministry of Social Protection of the State party.

7.3 The authors point out that the State party did not comment on the allegation that the authors' right to equality before the law had been violated as a consequence of the ruling of the High Court of Justice of Bogotá in the case of J.A.H.P. (see para. 3.4). Even though the case in question was identical to that of the authors, the High Court not only recognized the right of J.A.H.P. to trade union privileges but also ruled that the Federation must reinstate him in his former job and pay him back wages.

7.4 The matter with which this communication is concerned has not been submitted by the authors for examination by another international body or under another international procedure. Moreover, CETCOIT is neither an ILO body nor an international procedure for the protection of rights, but rather an independent mediation body that seeks to resolve labour disputes and avoid the need for referral to international bodies or ILO supervisory mechanisms. The good offices of CETCOIT may be sought voluntarily and are not required for the submission of a complaint to the Committee on Freedom of Association of the ILO Governing Body. Furthermore, SINTRAFEC sought assistance from CETCOIT regarding the general situation created by the Federation and later decided to withdraw from the procedure. This withdrawal does not require authorization by any of the parties or by CETCOIT; it should therefore be considered to have been completed. In addition, ILO dispute settlement procedures are governed by articles 24 and 26 of the ILO Constitution (representations and complaints, respectively), and petitions and communications may be submitted only by States parties or by industrial associations of employers or of workers, not by individuals.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the case is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes the State party's argument that the communication is inadmissible under article 5 (2) (a) of the Optional Protocol because the acts or events constituting the basis for the complaint are being examined by CETCOIT pursuant to communications submitted by SINTRAFEC to ILO. The Committee further notes the authors' comments to the effect that they have not submitted the matter in the present communication to another international body or procedure and that CETCOIT is neither an ILO body nor an international procedure for the protection of rights, but rather an independent mediation body that seeks to resolve labour disputes and avoid the need for referral to international bodies or ILO supervisory mechanisms. In addition, the complaints that were brought before CETCOIT were submitted by SINTRAFEC and referred to Federation policies in general that allegedly constituted violations of the right of association, including in the case of the authors; moreover, as SINTRAFEC later withdrew, the procedure should be considered closed. In the light of this information, the Committee considers that the complaints submitted to it by the authors are not being examined under another procedure of international investigation or settlement and that the Committee is therefore not precluded from examining the communication under article 5 (2) (a) of the Optional Protocol.

8.3 The Committee notes the State party's argument that the communication should be declared inadmissible as an abuse of the right of submission because it contains false, distorted, incomplete and unclear information. The Committee points out, however, that the fact that the State party and the authors of the communication disagree on the facts, the application of the law, the collective labour agreements and the case law of the relevant domestic courts does not, in itself, constitute an abuse of the right of submission. The Committee also notes the State party's argument that the communication is inadmissible owing to the delay between the last decisions of the national courts and the submission of the communication to the Committee. The Committee recalls its jurisprudence to the effect that a communication may constitute an abuse of the right of submission when an exceptionally long period of time has elapsed, without sufficient justification, between the events involved in the case or the exhaustion of domestic remedies and the submission of

the communication.[15] The Committee notes that, in this instance, after the rulings of the High Court of Justice of Bogotá, which were issued between 13 June and 28 November 2008, four of the authors filed petitions for *amparo* which were rejected by the Supreme Court. The Committee considers that the period of time that elapsed between the last decisions of the national courts and 22 June 2010, the date on which the communication was initially submitted, does not constitute an abuse of the right of submission under article 3 of the Optional Protocol.

8.4 The Committee notes the State party's argument that the communication does not meet the requirement laid down in article 5 (2) (b) of the Optional Protocol because the issue could have been addressed through collective bargaining between the trade unions and the Federation. The Committee further notes the authors' statements to the effect that they exhausted all effective domestic remedies with the rulings of the High Court of Justice of Bogotá, which rejected the special applications they had filed for reinstatement by the Federation on the basis of trade union privileges, and that a petition for *amparo* is a special remedy that cannot be used against court rulings, as shown by the decisions of the Supreme Court, which found that the petitions for *amparo* filed by four of the authors were inadmissible. The Committee notes that the State party has not refuted the authors' claims regarding the special nature of the remedy of *amparo*. The Committee considers that collective bargaining, the purpose of which is the adoption of a labour agreement between workers and an employer, does not constitute a domestic remedy within the meaning of article 5 (2) (b) of the Optional Protocol. The Committee therefore considers that it is not precluded from examining the communication under article 5 (2) (b) of the Optional Protocol.

8.5 With regard to the authors' complaints relating to the violation of their right to due process and to access to an effective legal remedy under article 14 (1), read separately and in conjunction with article 2 (2) and (3), of the Covenant, the Committee notes that the authors were able to submit special applications for reinstatement which were examined at two instances by ordinary courts in accordance with the law and that four of the authors later filed petitions for *amparo* that were rejected by the Supreme Court. Furthermore, the authors' allegations refer primarily to the evaluation of the facts and the application of domestic legislation, including the collective labour agreements and the relevant case law, by the national courts. The authors claim that it is illogical for the courts to recognize, on the one hand, that they were entitled to trade union privileges owing to the positions that they held in SINTRAINDUSCAFÉ but to rule, on the other, that the Federation did not require prior judicial authorization because the termination of the employment relationship had resulted, not from dismissal, but from the expiry of fixed-term employment contracts that were not renewed by the Federation. The Committee recalls that article 14 of the Covenant guarantees procedural equality but cannot be interpreted as guaranteeing equality of results or absence of error on the part of the competent tribunal.[16] The Committee also recalls its jurisprudence to the effect that it is generally for the courts of States parties to evaluate the facts and evidence in each case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted

[15] See communications No. 1434/2005, *Fillacier v. France*, inadmissibility decision of 27 March 2006, para. 4.3; No. 1800/2008, *R.A.D.B. v. Colombia*, inadmissibility decision of 31 October 2011, para. 7.3; and No. 1849/2008, *M.B. v. Czech Republic*, inadmissibility decision of 29 October 2012, para. 7.4. The Committee recalls that rule 96 (c) of its current rules of procedure is applicable to communications received by the Committee as of 1 January 2012 and provides that "an abuse of the right of submission is not, in principle, a basis of a decision of inadmissibility *ratione temporis* on grounds of delay in submission. However, a communication **may** [emphasis added] constitute an abuse of the right of submission if it is submitted after 5 years from the exhaustion of domestic remedies by the author of the communication, or, where applicable, after 3 years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay taking into account all the circumstances of the communication."

[16] See communication No. 273/1988, *B.d.B. et al. v. The Netherlands*, inadmissibility decision of 30 March 1989, para. 6.4.

to a manifest error or denial of justice.[17] The Committee has examined the materials submitted by the parties, including the rulings handed down at first instance and by the High Court of Justice of Bogotá on the applications for reinstatement based on trade union privileges, which were the subject of the complaints submitted by the authors to the Committee, and notes the points on which the authors disagree with the national courts' application of domestic legislation. However, in this particular case, the Committee considers that these materials do not show that the legal proceedings themselves were flawed in the ways mentioned above. Consequently, the Committee considers that the authors have not sufficiently substantiated their claims of a violation of article 14, read separately and in conjunction with article 2 (3), and that this part of the communication is therefore inadmissible under article 2 of the Optional Protocol. The Committee further recalls its jurisprudence, which indicates that the provisions of article 2 cannot be invoked as a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim of a violation.[18] In the present case, the Committee does not consider an examination of the issue as to whether the State party violated its general obligations under article 2 (2) of the Covenant to be distinct from an examination of the possible violation of the authors' rights under article 14 of the Covenant. The Committee therefore considers that the authors' claims in that regard are incompatible with article 2 of the Covenant and inadmissible under article 3 of the Optional Protocol.

8.6 The Committee notes the authors' allegations that the court rulings constituted a violation, in practice, of their rights under article 22 of the Covenant. The Committee notes that the decisions to reject the authors' applications recognized their right to join a trade union and to trade union privileges, but considered that the latter privileges did not apply to their cases because their loss of employment was due, not to dismissal, but rather to the expiry of their contracts. Since there is no other evidence of a link between the authors' loss of employment and the exercise of their rights under article 22 of the Covenant, the Committee considers that the allegations concerning the violation of this provision have not been sufficiently substantiated for the purposes of admissibility and are therefore inadmissible under article 2 of the Optional Protocol.

8.7 The Committee notes the authors' claims that the rulings of the High Court of Justice of Bogotá constituted a violation of their right to equality before the law under article 26 of the Covenant on the ground that those rulings were contrary to the High Court's decision of 31 July 2008 in a similar case brought by another Federation worker who had been a member of the national governing body of SINTRAINDUSCAFÉ. The Committee notes, however, that contradictory court rulings are not, in themselves, proof of discrimination and that, for the purposes of admissibility, the authors have not sufficiently shown how they have been discriminated against on any of the grounds mentioned in article 26 of the Covenant. The Committee therefore considers that this complaint is inadmissible under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the authors.

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[17] See the Committee's general comment No. 32 (2007) on article 14, on the right to equality before courts and tribunals and to a fair trial, para. 26. See also communication No. 1616/2007, *Manzano and others v. Colombia*, decision of 19 March 2010, para. 6.4.

[18] See communication No. 2030/2011, *Poliakov v. Belarus*, Views adopted on 17 July 2014, para. 7.4.